

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 19th June, 2025

DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl.A. No.17 of 2024

Appellant : Dhiran Chettri

versus

Respondent : State of Sikkim

Appeal under Section 374(2) of the
Code of Criminal Procedure, 1973

Appearance

Mr. Bhusan Nepal, Advocate (Legal Aid Counsel) for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Prosecution case commenced with the lodging of the FIR (Exbt P-1/PW-1) by PW-1, the uncle of the victim, alleging that on 07-02-2022, PW-2, his niece, the victim had gone for tuition. She called him up that evening from her friend's mobile to inform him that she would sleep over at her friend's house and return the next morning. When she failed to return the next morning, he set out to look for her. She was traced at 02.00 p.m., on 08-02-2022, near the town butchers shop. On enquiry from her, she reported that the Appellant had taken her to an abandoned building and raped her there.

(i) Charge-sheet was submitted against the Appellant under Section 376 of the Indian Penal Code, 1860 (hereinafter, the "IPC") read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act"). The Appellant was charged under the aforementioned provisions of law by the

Trial Court. On his having entered a plea of "not guilty", the Prosecution examined ten witnesses to prove their case. The closure of the Prosecution evidence was followed by the examination of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."). He claimed innocence and stated that he was falsely implicated in the instant matter.

(ii) The Court of the Learned Special Judge (POCSO Act, 2012) Gangtok, Sikkim, on consideration and appreciation of the evidence on record, convicted the Appellant vide the impugned Judgment, dated 07-03-2024, in ST (POCSO) Case No.07 of 2022 (*State of Sikkim vs. Dhiran Chettri*) under Section 376(1) of the IPC. He was sentenced to undergo rigorous imprisonment for a term of ten years and to pay a fine of ₹ 2,000/- (Rupees two thousand) only, under Section 376(1) of the IPC with a default stipulation.

2. Assailing the said Judgment and Order on Sentence, Learned Counsel for the Appellant submitted that the narrative of PW-2, the victim, is fraught with improbabilities as the place from where the Appellant allegedly took her forcibly, requires him to have dragged her, a grown girl, through the streets of the crowded town, milling with people and taxis are parked along the road with drivers waiting for passengers. In such a circumstance, it is surprising that she did not cry out for help nor did people on the streets notice her distress. She was allegedly taken at 06.00 p.m. by the Appellant to the abandoned building but strangely left it at around 01.30 p.m., the next day, *sans* explanation as to why she continued to remain in the building after his departure the next morning or why she did not seek help. The evidence of the victim

PW-2 and PW-6 her friend do not corroborate each other regarding the incident and the conduct of PW-2 and are in fact contradictory. The evidence of PW-7, the victim's cousin proves that the victim had gone of her own will with the Appellant. The victim's evidence of forcible sexual assault, contradicts the medical evidence as the doctor found no injuries on the person of the victim. It was urged that despite all of the aforementioned anomalies, the Court found the victim's evidence to be cogent and based the Appellant's conviction on it. The victim is in fact not a "sterling witness" and her evidence deserves to be disregarded. To buttress his submissions, Learned Counsel for the Appellant relied on ***Sushan Darjee (Hingmang) vs. State of Sikkim***¹ and ***Nirmal Premkumar and Another vs. State rep. by Inspector of Police***².

3. Contesting the arguments advanced by Learned Counsel for the Appellant, Learned Additional Public Prosecutor stated that although the age of the victim was not proved, the fact that she was raped has not been decimated in the cross-examination of the victim, hence the Judgment and Order on Sentence warrants no interference.

4. We have heard the arguments advanced by Learned Counsel and carefully perused the documents, evidence on record, impugned Judgment and citations made at the Bar.

5. The Trial Court, vide the impugned Judgment framed two questions for determination — Whether on the night of 07-02-2022, the accused committed penetrative sexual assault on the victim inside an abandoned building near Bhanu Park, at Singtam?

¹ Decided by the Division Bench of this High Court on 30-04-2025, in Crl. A. No.27 of 2024

² 2024 SCC OnLine SC 260

If so, whether she is a minor within the meaning of Section 2(d) of the POCSO Act, 2012?

6. The Trial Court having considered the evidence of the Prosecution witnesses was in agreement with the Appellant/accused, that it was unlikely that he could have forcibly taken the victim to an abandoned building, where the incident is said to have occurred. On the contrary, it would appear from the circumstances that the victim had voluntarily gone with the Appellant. However, the Court also came to the conclusion that at the said spot, the Appellant forced himself upon her and raped her. It was reasoned by the Trial Court that, though she may have agreed to go with the Appellant to the building, however the Appellant had transgressed into her personal space without her consent and thereby violated her person. The Trial Court also found that there was no consistency in the evidence of PWs 1, 6 and 7 about the victim's age and there was no corroboration with the school records nor was the birth certificate found in the case records, the benefit of doubt on this facet was extended to the Appellant.

7. The question that emerges, thus, for determination is whether the evidence of the victim inspires the confidence of this Court to enable conviction of the Appellant or whether there is a manifest error in the conclusion of the Trial Court, leading to miscarriage of justice.

(i) This being a case of sexual assault, there is no eye-witness to the incident, all that this Court can rely on is the evidence of the victim, which therefore has to qualify as being of

“sterling quality”, for which purpose it is to be weighed and assessed by the Court.

(ii) In **Ganesan** vs. **State represented by its Inspector of Police**³ the Supreme Court held that the sole testimony of the victim, if found reliable and trustworthy, requires no corroboration and may be sufficient to invite conviction of the accused.

(iii) In **Krishan Kumar Malik** vs. **State of Haryana**⁴, the Supreme Court lay down as follows;

“**31.** No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant.”

(iv) The Supreme Court in **Nirmal Premkumar and Another** (*supra*) made a reference to the decision in **Rai Sandeep alias Deepu** vs. **State (NCT of Delhi)**⁵ and observed *inter alia* that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a “sterling witness” without further corroboration, but the quality and credibility must be exceptionally high. The statement of the Prosecutrix ought to be consistent from

³ (2020) 10 SCC 573

⁴ (2011) 7 SCC 130

⁵ (2012) 8 SCC 21

the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt *qua* the Prosecution's case. While a victim's testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the Prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.

8. While considering and bearing the above principles in mind, it is necessary to juxtapose the statements made by her in her evidence in the Court and in her Section 164 Cr.P.C. statement the contents of which were read over to her and admitted to have been made by her. Before proceeding further, it may be noticed that Section 164 of the Cr.P.C. statement is not substantive evidence and can only be used for corroboration and contradiction.

In ***R. Shaji*** vs. ***State of Kerala***⁶ it was held as follows;

"26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted.

⁶ (2013) 14 SCC 266

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.” (emphasis supplied)

(i) That having been said, it is seen that PW-2 deposed that when she was waiting for a vehicle the Appellant came to where she was and offered to drop her home. When he forcibly pulled her, she screamed but no one heard her as everyone had left by then. In her Section 164 Cr.P.C. statement she made no statement of having screamed for help.

(ii) In Court, she stated that the Appellant left the building at around 01.00 p.m. and she left around 01.30 p.m. In her Section 164 Cr.P.C. statement she stated that the “next morning”, she heard him leave after which, she also left the premises and reported the matter to her brother, who she met near the butchers shop.

(iii) In Court, she stated that she met her brother near the butchers shop, he took her to the police station but admitted under cross-examination that she had stated to the police (Section 161 Cr.P.C. statement) that on 08-02-2022, at around 10.00 a.m. she went to “S” bazaar and stayed there and after some time her *phupu* (PW-3) came and she went with her to the police station.

(iv) Contrary, to her earlier statement that she had met only her brother near the butchers shop and he took her to the police station, she again stated that her aunt and her brother came to the place where she was waiting, she did not specify where she was waiting but merely stated it was in the bazaar, no mention of the butchers shop was made.

(v) A third twist was added to the case by her by deposing in Court that PW-3 and her brother came with her “family members” to the bazaar where she was waiting. Apart from the above anomalies, under cross-examination she also added that after she fled from the place of occurrence she reached the “S” bazaar and borrowed someone’s phone in the market and called her *phuphu* (PW-3).

(vi) After they reached the spot, the Appellant as per PW-2, forcibly began touching her and had forcible sex with her. She managed to push him away and fled from the spot and hid in a room in the building, there was no one around. She could hear him looking for her. She remained there the whole night and she could hear him in another room in the same building.

(vii) She further testified that she did not scream when they were together in one room as he covered her mouth. After she escaped from his clutches, according to her, she was unable to scream from the other room where she was hiding “as it was pitch dark and she could not see anything”. The incongruity of the statement is apparent, since what the darkness had to do with her capacity to scream and seek help is a facet that needs to be mulled over considering that she was in another room.

(viii) From the evidence, it can be seen that the witness has failed to be consistent. In light of her vacillating statements, it is essential to look for corroboration in the evidence of the other Prosecution witnesses.

(ix) PW-3 the aunt of the victim deposed that the victim informed her on the relevant day that she did not get a vehicle to return home. When the victim did not reach home after 07.00

p.m. she called back PW-6 the victim's friend. Her father took the call and when she asked him about PW-2, he told her that she had not stayed back at their house but had already left from there. The victim did not return that night. PW-3 along with her husband went to the market to search for the victim the next morning but could not find her, upon which they went to the "S" police station and reported the matter. The victim deposed that after, she fled from the place of occurrence (01.00 to 01.30 p.m.), she called her aunt PW-3 testified that, the victim called her at 04.00 p.m. there is therefore a gap of two/three hours in the evidence of PW-2 and PW-3 with regard to the said call, which the Prosecution evidence has failed to explain.

(x) PW-6 in her evidence narrated the entire events indicating the conduct of the victim and stated that;

".....
She told me that she would not attend her coaching class that day as she was going to meet her brother and sister-in-law at Gangtok. The same evening at around 4 to 5 pm, she came to my house and called up her *Phupu* from my phone and asked permission from her to spent a night at my place. However, her *Phupu* scolded her and told her to stay at my place for the night and the next morning she would come to pick her from there (*under objection by the defence being beyond her statement recorded under Section 161 Cr.P.C., 1973*). After the said phone call she left my place saying that **she would try to find a vehicle to return home and also told me to tell her aunt that she was still at my place in case she called me** (*under objection by the defence being beyond her statement recorded under Section 161 Cr.P.C., 1973*). Later the same evening I heard my father talking to the victim's aunt over the phone and enquiring about the victim.

....."
(emphasis supplied)

(xi) PW-4 the Doctor, who examined her on 08-02-2022, at 06.45 p.m., deposed that PW-2 gave him the history as recorded in Exbt P-4/PW-4, the victim's medical report, as follows;

".....
On 08.02.2022, at 6.45 pm, a 16 years old girl was

forwarded for her medical examination at the Hospital accompanied by Constable Dawa Lhamu Bhutia of Singtam PS and her sister. As per the history given by the victim on 07.02.2022 around 6 pm, after the tuition at Shantinagar she was waiting for taxi to return home when suddenly Dhiren Chettri, 19 years old caught her and led her to old pharmaceutical company located opposite to Bhanupath where he took her in a room. **He then grabbed her by her hip and engaged in sexual intercourse after which she pushed him away and ran towards the door, opened it and locked him inside the room from outside. She escaped and went towards Singtam, where she reached at around 2 p.m.**

I, accordingly, examined her after obtaining consent from her sister in the presence of staff nurse Hitaishhi.

On per vaginal examination (PV):-

- 1) pubic hair – trimmed black in colour
- 2) labia minora – mild swelling present
- 3) Hymen – ruptured
- 4) No active bleeding.

On local examination:-

- 1) No bite mark was seen on her body;
- 2) No abrasion/bite marks on her bilateral breasts.

Her systemic examinations were all within normal limits.

Urine pregnancy test was done and the result was negative. Her vaginal swab, vaginal wash, undergarment (purple lining, pink polka dots, purple butterfly prints).

.....”
(emphasis supplied)

(xii) Contradictions are apparent in the evidence of PW-2 in her narration to PW-4. PW-2 in Court deposed that, she fled the spot and hid in another room, but to PW-4 she told him that she “locked” the Appellant inside a room, from outside and went towards “S”, where she reached at 02.00 p.m. The question that comes to mind is, if she had locked him inside at night, what prevented her from leaving the building and seeking help after locking him. Why did she opt to come out of the building only around 01.00/01.30 p.m. the next day. It is her case that, he took her forcibly by her hand towards the park, it is indeed surprising that no one on the streets witnessed her being forced by the Appellant toward the Park nor did she seek help. Both she and the Appellant were walking and not in a vehicle for her to have

been the hapless victim. Evidently, she had told PW-6 to lie about her whereabouts to PW-3. The evidence of PW-2 in light of the foregoing vacillations does not inspire the confidence of this Court and consequently we find that she does not meet the parameters set out for a "sterling witness".

(xiii) PW-7 is the victim's cousin, being the daughter of PW-3. According to her, on the relevant day her mother called her up and told her that PW-2 had not returned home from her tuition classes. PW-3 called her a second time and informed her that PW-2 would be spending the night in the house of her friend PW-6. PW-7 got suspicious and rang up PW-6, who kept changing her statements about the victim, viz; that she had already left her place and returned home and then again telling PW-7 that she (PW-6), was in the market at that moment, whereas PW-2 was in her house (house of PW-6), and she would call PW-7 when she reached home. PW-7 then got the phone numbers of the parents of PW-6 and called her mother and enquired about PW-2. The mother of PW-6, told her that, PW-2 had already left their place at 05.00 p.m. saying that she would not return if she did not get a vehicle. After a while PW-7 again called up PW-6, who told her that PW-2 had earlier been with her but had now returned home. PW-7 then called the victim's other tuition friends who told her that PW-2 and PW-6 both had not attended their tuition class that day. She also called her brother's friends and asked whether they had seen PW-2 that day. One of them told her that, she had seen PW-2 with the Appellant at the walkway of "S" bazaar. She then checked the Facebook and saw pictures of PW-2 and the Appellant together, on the Facebook. That night, PW-2 did not return home

and they continuously looked for her in and around "S" but could not find her. The next morning her mother went to "S" police station and reported the matter. Later, when she, her parents and her brother were near the butcher's shop, the victim also reached and on enquiry she told them that she had spent the night in the house of PW-6. Her cross-examination could not decimate the fact that PW-2 had told her that she had spent the night in the house of PW-6. She also admitted that on scolding PW-2, she told them that she was with the Appellant the previous night. The evidence of this witness therefore clearly establishes that the victim had not come out with the truth and PW-6 had also assisted her by telling lies about her whereabouts to PWs 3 and 7. The fact that PW-7 saw both PW-2 and the Appellant on Facebook has not been demolished under cross-examination.

(xiv) We are disinclined to consider the evidence of PW-2, against the Appellant, alleging that he forcibly perpetrated the offence of sexual offence on her and we cannot bring ourselves to agree with the finding of the Trial Court that the act was not consensual and that the Appellant had forced himself on the victim, when all the evidence indicates otherwise. She is a partner in crime and when discovered she chose to cry foul against the Appellant.

9. So far as the age of the victim is concerned, the IO PW-10 admitted that she had not seized the Birth Certificate of the victim in this case. She also did not send a requisition to the Registrar of Births and Deaths for verification of the victim's date of birth. PW-8 was the teacher of the school where PW-2 was reading. He checked and verified the school admission register containing

the particulars of the victim and found that she was admitted in the school on 28-02-2011, in Class I and her date of birth was recorded as 18-06-2005. Admittedly, PW-8 was not the person who had made the entries in the school admission register. No effort was made by the Prosecution to verify as to who had made the entries in the victim's date of birth to enable the Court to reach a finding that the entries were genuine or that the person who gave the date had special means or the knowledge of the date and time mentioned therein. In the absence of unimpeachable documents to establish the victim's age, we are in agreement with the Trial Court that the Prosecution has failed to prove that the victim was a child in terms of Section 2(d) of the POCSO Act.

(i) Further, after due consideration and appreciation of the witnesses of the Prosecution, we are of the considered view that the Prosecution has failed to establish that, the victim was subjected to forceful penetrative sexual assault. After sifting the chaff from the grain of evidence, we are of the considered view that the sexual intercourse was consensual.

10. The impugned Judgment of the Trial Court is set aside so far as the finding on penetrative sexual assault is concerned. The impugned Order on Sentence is also set aside.

11. The Appellant is acquitted of the offence under Section 376(1) of the IPC.

12. The Appeal is allowed.

13. The Appellant be set at liberty forthwith, if not required in any other matter.

14. Fine, if any, deposited by the Appellant in terms of the impugned Order on sentence, be reimbursed to him.

- 15.** No order as to costs.
- 16.** Copy of this Judgment be forwarded forthwith to the Learned Trial Court along with its records.
- 17.** A copy of this Judgment also be made over to the Appellant through the Jail Superintendent, Central Prison, Rongyek and also to the Jail Authority at the Central Prison, Rongyek, for information and appropriate steps.

(Bhaskar Raj Pradhan)
Judge
19-06-2025

(Meenakshi Madan Rai)
Judge
19-06-2025

Approved for reporting : **Yes**